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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 JASON E. DAVIS,

No. C 07-1767 SI

9 Plaintiff,

**ORDER DENYING DEFENDANT
UNIFUND CCR PARTNERS' MOTION
TO DISMISS**

10 v.

11 UNIFUND CCR PARTNERS, et al.,

12 Defendants.
13 _____/

14 Pursuant to Civil Local Rule 7-1(b), the Court took defendant's motion to dismiss under
15 submission, and ordered supplemental briefing. The Court has reviewed the parties' supplemental
16 papers, and for the reasons set forth below, DENIES the motion.
17

18 **BACKGROUND**

19 On March 28, 2007, plaintiff Jason Davis filed this action against Unifund CCR Partners
20 ("Unifund"), an Ohio corporation, and Steven Booksa. The complaint alleges that Unifund is in the
21 business of collecting consumer debts owed to another, and that Booksa is an individual "regularly
22 engaged in attempting to collect debts owed to another through litigation in this state." Complaint ¶¶
23 4-5.

24 The complaint alleges that Unifund, through its attorney Booksa, filed a lawsuit against Davis
25 on May 31, 2006 in the Superior Court of California, County of Stanislaus. *Id.* ¶ 30; Defendants'
26 Request for Judicial Notice Ex. A (state court complaint). Unifund filed the state court action as an
27 assignee of Citibank, and sought to collect on a debt owed by Davis on a Citibank credit card.
28 Complaint ¶ 29. Davis asserted a number of affirmative defenses, including that Unifund had failed to

1 state a valid claim, that its claims were barred by the statute of limitations, that the Citibank contract was
 2 unenforceable and illusory, and that Unifund was in violation of the federal Fair Debt Collection
 3 Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, and the California Rosenthal Act, Cal. Civ. Code
 4 § 1788 *et seq.* See Defendants’ Request for Judicial Notice Ex. B (state court answer). Davis did not
 5 assert any counterclaims in the state court action. *Id.* Unifund dismissed the state court action without
 6 prejudice on November 17, 2006. Complaint ¶ 37.

7 Davis brings the instant action under the FDCPA and the Rosenthal Act. The complaint alleges
 8 that defendants “knew that the alleged evidence they possessed, and were willing or able to obtain
 9 during the course of [the state court] litigation was, and would be insufficient as a matter of law to prove
 10 a case at the time of trial” but that nevertheless defendants continued to prosecute the state court action.
 11 *Id.* ¶¶ 33-34. The complaint also alleges that defendants knew or should have known that the state court
 12 action was time-barred, and that defendants “engaged in an unfair or unconscionable means of collecting
 13 a debt.” *Id.* ¶¶ 39-40. In addition, the complaint alleges,

14 Defendants thus institute debt-collection suits such as that against the Plaintiff in the
 15 hopes that the matter will go by default to UNIFUND. Defendants therefore count on
 16 obtaining a default judgment in such cases with “evidence” that they know would not
 survive opposition scrutiny at trial. Defendants are unwilling and incapable of obtaining
 appropriate evidence to prevail at trial.

17 Defendants’ primary purpose in filing actions against debtors is to obtain default
 18 judgments; Defendants regularly dismiss actions filed against debtors if the debtor
 19 contests the lawsuit because of a) Defendants’ lack of and inability to obtain admissible
 evidence and b) Defendants’ wish to avoid liability for a defendant’s attorneys’ fees.

20 When UNIFUND dismisses such actions without prejudice, it may sell the account to
 21 another company that buys old debt, knowing, and thus perpetuating the possibility that
 the debtor may be subjected to further debt collection activities.

22 *Id.* ¶¶ 25-27.

23 LEGAL STANDARD

24 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it
 25 fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss
 26 is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer
 27 evidence in support of the claim. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other*
 28

1 grounds by *Davis v. Scherer*, 468 U.S. 183 (1984).

2 In answering this question, the Court must assume that the plaintiff's allegations are true and
3 must draw all reasonable inferences in the plaintiff's favor. See *Usher v. City of Los Angeles*, 828 F.2d
4 556, 561 (9th Cir. 1987). Even if the face of the pleadings suggests that the chance of recovery is
5 remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. See
6 *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

7 If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The
8 Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request
9 to amend the pleading was made, unless it determines that the pleading could not possibly be cured by
10 the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
11 quotation marks omitted).

12 DISCUSSION

13
14 Unifund moves to dismiss the complaint on the ground that plaintiff's FDCPA and Rosenthal
15 claims are compulsory counterclaims that plaintiff should have filed and pursued in the state court
16 action. The California compulsory counterclaim rule is contained in California Code of Civil Procedure
17 § 426.30, which provides in relevant part,

18 Except as otherwise provided by statute, if a party against whom a complaint has been
19 filed and served fails to allege in a cross-complaint any related cause of action which (at
20 the time of serving his answer to the complaint) he has against the plaintiff, such party
may not thereafter in any other action assert against the plaintiff the related cause of
action not pleaded.

21 Cal. Code Civ. Proc. § 426.30. Defendant argues that plaintiff was required to raise the FDCPA and
22 Rosenthal Act claims in state court because those claims directly arise out of the same set of operative
23 facts at issue in the collection case, namely the ownership and enforceability of the debt. Defendant
24 cites several Ninth Circuit cases holding that a party who fails to assert a compulsory counterclaim in
25 state court may not subsequently pursue the claim in federal court. None of these cases, however,
26 involve the relationship between state collection actions and subsequent federal FDCPA claims.

27 Plaintiff responds that the instant unfair debt collection claims arise out of a different set of facts
28 than the state collection action. Here, plaintiff does not challenge the validity of the debt, but rather the

1 allegedly illicit methods by which defendants sought collection. Plaintiff also emphasizes the fact that
2 the instant claims are based, in part, on defendants' actions *after* initiating the state court collection
3 action, and thus plaintiff's FDCPA and Rosenthal Act claims could not have been asserted "at the time
4 of serving his answer to the complaint." Cal. Code Civ. Proc. § 426.30.

5 The Court concludes that plaintiff's FDCPA and Rosenthal Act claims are not compulsory
6 counterclaims, and thus plaintiff is not barred from bringing the instant action. Although the FDCPA
7 and Rosenthal Act claims are generally related to the subject matter of the state collection action –
8 plaintiff's Citibank debt – the FDCPA and Rosenthal Act claims arise out of a different set of facts
9 related to defendants' alleged unfair and illegal practices in their efforts to collect on that debt. Other
10 courts have agreed that collection claims and FDCPA claims do not arise out of the same set of
11 operative facts. *See, e.g., Whitaker v. Ameritech Corp.*, 129 F.3d 952, 958 (7th Cir. 1997); *Peterson v.*
12 *United Accounts, Inc.*, 638 F.2d 1134, 1137 (8th Cir. 1981) ("Although there is some overlap of issues
13 raised in both cases as a result of the defenses raised in the state action, the suit on the debt brought in
14 state court is not logically related to the federal action initiated to enforce federal policy regulating the
15 practices for the collection of such debts."); *Campos v. Western Dental Servs.*, *Egge v. Healthspan*, 404
16 F. Supp. 2d 1164, 1168-69 (N.D. Cal. 2005); *Sparrow v. Mazda Am. Credit*, 385 F. Supp. 2d 1063,
17 1068-69 (E.D. Cal. 2005).

18 Accordingly, for the foregoing reasons the Court DENIES defendant's motion to dismiss.
19 (Docket No. 12).

20
21 **IT IS SO ORDERED.**

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23 Dated: June 20, 2007

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26 SUSAN ILLSTON
27 United States District Judge
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